Order

Michigan Supreme Court
Lansing, Michigan

November 18, 2022

Bridget M. McCormack,
Chief Justice

161690-1

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

KENNETH McKENZIE,
Plaintiff-Appellee,

v

SC: 161690
COA: 347061
Wayne CC: 18-002451-CD

DEPARTMENT OF CORRECTIONS, STATE OF MICHIGAN, and MACOMB CORRECTIONAL FACILITY WARDEN,
Defendants-Appellants,
and

RANDALL HAAS,
Defendant.

_____/

FATIMA OLDEN,
Plaintiff-Appellee,

v

SC: 161691
COA: 347798
Wayne CC: 18-001424-CD

DEPARTMENT OF CORRECTIONS, STATE OF MICHIGAN, and MACOMB CORRECTIONAL FACILITY WARDEN,
Defendants-Appellants.

_____/

On March 3, 2022, the Court heard oral argument on the application for leave to appeal the May 7, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*).

Plaintiffs have brought federal claims against state agencies and officials—claims that, until now, have always been heard in federal court. But today this Court leaves in place a decision by the Court of Appeals opening the circuit court doors to these claims. This resolution rests on an incorrect interpretation of the Court of Claims (COC) Act, particularly MCL 600.6440, and disregards the relationship between sovereign immunity and jurisdiction. A proper view of our statutes and caselaw would require these claims to be brought in federal court. Contrary to plaintiffs' contentions, that outcome would not

violate the Supremacy Clause or the Tenth Amendment: federal law at issue would remain supreme and could be enforced in federal courts. That is the system that has long governed in this state for these types of claims. By failing to reverse the Court of Appeals' erroneous conclusion, the majority leaves in place a flawed opinion that subtly erodes our state's ability to determine the types of cases its courts will hear. I dissent.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs in these two cases sued the Michigan Department of Corrections (MDOC) and the warden of the Macomb Correctional Facility in Wayne Circuit Court. They alleged various claims, the relevant ones here being that the warden discriminated against them in violation of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., on the basis of their allergies to the dogs used in the prison and that the MDOC and the state of Michigan violated the Rehabilitation Act, 29 USC 701 *et seq*., by failing to provide reasonable accommodations for their allergies. The dogs were assigned to particular housing units, and plaintiffs, who worked in those units, requested a transfer to units without dogs. The warden initially honored this request but eventually returned plaintiffs to their original units.[1]

Defendants moved for summary disposition under MCR 2.116(C)(4), asserting that the circuit court lacked subject-matter jurisdiction over claims arising under federal law that could be remedied in federal courts. In particular, they noted that MCL 600.6419 gives the COC jurisdiction over suits against the state, but MCL 600.6440 exempts claims for which an adequate remedy is available in federal court. Accordingly, defendants argued that the exemption in MCL 600.6440 means that no Michigan court has subject-matter jurisdiction over federal-law claims against the state that are remediable in federal courts.

The trial court denied the motions, and the Court of Appeals affirmed in a published opinion. The Court of Appeals held that "[w]hile MCL 600.6440 precludes the filing of a claim in the Court of Claims if an adequate remedy exists, it does not explicitly preclude the concurrent jurisdiction of the circuit courts over such claims. . . . Divesting the Court of Claims of jurisdiction does not divest the circuit court of any jurisdiction it may already have." *McKenzie v Dep't of Corrections*, 332 Mich App 289, 307 (2020). The Court of Appeals also noted the general presumption that our state courts have concurrent jurisdiction with federal courts over federal claims.

Defendants then sought leave to appeal here. After receiving supplemental briefing, we ordered argument on the application for leave, focusing on "(1) whether MCL 600.6440

---

[1] Plaintiffs filed claims with the Equal Employment Opportunity Commission (EEOC). The EEOC found probable cause to believe that the MDOC had violated the ADA, but federal officials declined to pursue claims on plaintiffs' behalf.

divests the Court of Claims of jurisdiction over both of the appellees' causes of action arising under federal statute; and (2) if so, whether the circuit court shares concurrent jurisdiction with the federal courts over those causes of action." *McKenzie v Dep't of Corrections*, 508 Mich 943, 943-944 (2021).

II. ANALYSIS

The overriding question in these cases is whether the circuit court can exercise jurisdiction over the present claims. Both the text of the COC Act and the historical treatment of such claims plainly demonstrate that the circuit court lacks jurisdiction. This conclusion raises no Supremacy Clause concerns.

A. SOVEREIGN IMMUNITY

To understand the meaning of the COC Act, its historical background must be examined. The traditional rule across the common-law world, including Michigan, is that "the 'sovereign' was immune from suit unless he consented to the action." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 597 (1984). Thus, "[f]rom statehood forward, Michigan jurisprudence recognized that the sovereign (the state) was immune from *all* suits, including suits for tortious injuries which it had caused." *Id*. at 598. The rationale was not that "the state could do no wrong," but that the state had created the courts and therefore "was not subject to them or their jurisdiction." *Id*. As with many areas of law in the nineteenth century—such as divorces or corporate charters—the Legislature worked piecemeal, consenting to suits on an individual basis. *Id*. This proved infeasible, and in 1842 the state created a Board of State Auditors to decide whether to consent to suit; in the 1920s, this function transferred to the State Administrative Board, which could settle and pay claims. *Id*. at 599. The types of claims subject to the State Administrative Board's authority were those "arising from or by reason of negligence, malfeasance or misfeasance of any state officer, employe, commission, department, board, institution, or other governmental division . . . ." 1929 PA 259, § 1.

The state's sovereign immunity remained despite the grant of general jurisdiction to circuit courts in the 1850 Constitution.[2] The current Constitution states, "The circuit court shall have original jurisdiction in all matters not prohibited by law[.]" Const 1963, art 6, § 13. The statute setting out the circuit court's civil jurisdiction similarly states, "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605.

---

[2] Const 1850, art 6, § 8 (as amended) stated, "The circuit court shall have original jurisdiction in all matters civil and criminal, not excepted in this constitution, and not prohibited by law[.]"

After creation of the circuit courts in the 1850 Constitution, we continued to explain that "[t]he State has never, before or since, allowed itself to be sued in its own courts, and no officer could lawfully subject it to suit." *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 427 (1880). We reiterated this conclusion in *Greenfield Const Co, Inc v Dep't of State Hwys*, 402 Mich 172 (1978), stating:

> To the foregoing emphasized exceptions [to circuit court jurisdiction] this Court has earlier and repeatedly added those cases in which the defendant is by its sovereignty suit-immune.
>
> Thus it is well settled that the circuit court is without jurisdiction to entertain an action against the State of Michigan unless that jurisdiction shall have been acquired by legislative consent. [*Id*. at 194 (citations omitted).][3]

B. THE COC ACT

Greenfield was decided after the enactment of the COC Act, which was first passed in 1939. While the act did not specifically state that sovereign immunity had been waived, that was its clear effect: "By creating a court with jurisdiction over the state, the Legislature destroyed the theoretical basis for sovereign immunity. There was now an entity with power to hear cases against the state, and individual consent to suit was no longer required." *Ross*, 420 Mich at 600; see generally *Quality Tooling, Inc v United States*, 47 F3d 1569, 1575 (CA Fed, 1995) ("Just as a statute or contract that creates a right to monetary relief need not contain a redundant waiver of sovereign immunity, a Congressional enactment granting a federal court jurisdiction over a class of cases need not redundantly waive the government's sovereign immunity if it is otherwise waived."). The core provision, MCL 600.6419(1), provides the COC with jurisdiction over certain cases:

> Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. The state administrative board is vested with discretionary authority upon the advice

---

[3] Our cases distinguish "sovereign immunity from *suit* and sovereign immunity from *liability*." *Id*. at 193. "Legislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court." *Id*. "By waiving its immunity from liability, however, the state concedes responsibility for wrongs attributable to it and accepts liability in favor of a claimant. In so doing it may even create a cause of action in favor of the claimant which did not theretofore exist." *Id*. The present matter does not involve immunity from liability, which now generally is dealt with by the governmental tort liability act, MCL 691.1401 *et seq*.

> of the attorney general to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. Except as otherwise provided in this section, the court has the following power and jurisdiction:
>
> (a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

The exceptions noted in § 6419(1) deal with two separate circumstances. The first, § 6421, is for jury trials. It provides:

> Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue. [MCL 600.6421(1).]

Trials in the COC are "heard by the judge without a jury." MCL 600.6443. Thus, if a jury by trial is properly invoked, the case can be heard in a different court. The second exception—the main exception at issue here—is § 6440, which states:

> No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts, but it is not necessary in the complaint filed to allege that claimant has no such adequate remedy, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof. [MCL 600.6440.]

1. TEXTUAL ANALYSIS

The core question in the present matter is whether an action that falls within the exception in § 6440 must go to federal court or alternatively can go to circuit court.

Plaintiffs' argument in favor of circuit court jurisdiction proceeds from the observation that § 6440 does not directly and expressly require the claim to go to federal court. Moreover, so the argument goes, § 6440 is simply an exception to the COC's exclusive jurisdiction under § 6419(1), meaning that it deprives the COC of exclusive jurisdiction. And without exclusive jurisdiction vested in some other court (like the COC), the circuit court can exercise jurisdiction over the claim under MCL 600.605, which gives the circuit court jurisdiction unless (among other things) "exclusive jurisdiction is given in the constitution or by statute to some other court . . . ." Therefore, plaintiffs conclude that because the COC's jurisdiction is not exclusive, the circuit court enjoys jurisdiction.

This argument is wrong. The text of MCL 600.6440 is clear that claims falling within its terms must go to federal court. As noted, that section states, in relevant part: "No claimant may be permitted to file claim in [the COC] against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts . . . ." Imagine that parents give their 16-year-old child the chore of picking up groceries at Meijer. But they instruct her not to go to Meijer if there is a sale on groceries at Whole Foods. The child will no doubt be in trouble if, upon learning there is a sale at Whole Foods, she goes to Costco instead. The implication in the parents' directive is that the exception to the general directive to go to Meijer (i.e., the COC's exclusive jurisdiction) exists because of the sale at a particular store, Whole Foods (i.e., the adequacy of federal court remedies); therefore, if the exception applies the child must go there.[4] Thus, § 6440 does not send cases to circuit court or even create an indirect way for them to get there.

The relevant context supports this view. The most compelling evidence is the statute of limitations. It states, "Every claim against this state, cognizable by the court of

---

[4] The fact that this is implied rather than express follows from normal semantic principles. Participants in communication generally seek to avoid being " 'overinformative' because 'overinformativeness may be confusing in that it is liable to raise side issues; and there may also be an indirect effect, in that the hearers may be misled as a result of thinking that there is some particular POINT in the provision of the excess of information.' " *People v Mathews*, 505 Mich 1114, 1121 n 9 (2020) (VIVIANO, J., dissenting), quoting Grice, *Logic and Conversation*, in 3 *Syntax and Semantics: Speech Acts* (New York: Academic Press, 1975), p 46. "Thus, for example, the statement 'Jane has two children' does not implicate that Jane has more than two children, even though the statement would remain true if she had a third child." *Mathews*, 505 Mich at 1121 n 9, quoting Kaplan, *Linguistics and Law* (New York: Routledge, Taylor & Francis Group, 2020), p 7. In the same way, the Legislature might have thought that adding an express requirement in § 6440 that the case be filed only in federal court would be overinformative and unnecessary. Indeed, it might not have occurred to the Legislature that there was another alternative in the state—the circuit court—because these types of federal claims had *never gone there before*.

claims, is forever barred unless the claim is filed with the clerk of the court or an action is commenced on the claim in federal court as authorized in section 6440, within 3 years after the claim first accrues." MCL 600.6452(1). This section indicates that the statute authorizes suit only in federal court—if it had authorized suit in the circuit court, this section no doubt would have mentioned it.

And when the Legislature wanted the circuit court to retain or assume jurisdiction over a case that otherwise might fall to the COC, it said so expressly. In MCL 600.6421, for example, the Legislature explicitly gave the circuit court (or district or probate courts) jurisdiction over cases in which a proper jury demand had been made. In § 6419(4) through (6), the Legislature ensured that the circuit court's jurisdiction over certain categories of cases remained unaffected by the COC Act.[5] In other statutes allowing claims against the state to be brought in circuit court, the authorization was explicit.[6]

---

[5] Section 6419(4) states:

> This chapter does not deprive the circuit court of this state of jurisdiction over actions brought by the taxpayer under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, upon the circuit court, or proceedings to review findings as provided in the Michigan employment security act, 1936 (Ex Sess) PA 1, MCL 421.1 to 421.75, or any other similar tax or employment security proceedings expressly authorized by the statutes of this state.

Section 6419(5) states:

> This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law.

Finally, § 6419(6) states:

> This chapter does not deprive the circuit court of exclusive jurisdiction to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963.

[6] For example, the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, defines "person" to include "the state or a political subdivision of the state or an agency of the state . . . ." MCL 37.2103(g). It then defines an "employer" as "a person who has 1 or more employees . . . ." MCL 37.2201(a). Various obligations are placed on employers (i.e., "persons," which includes the state) and other persons in employment and public accommodations. MCL 37.2202; MCL 37.2302. Suits brought for violations of the statute "may be brought in the circuit court . . . ." MCL 37.2801(2). Cf. *Does 11-18 v Dep't of*

Properly read, then, the COC Act does not demonstrate a legislative intent that cases falling within § 6440 can be filed in the circuit court—instead the act indicates that such cases must be filed in federal court. This is enough, in my view, to demonstrate that the circuit court lacks jurisdiction here and that the case must proceed, if at all, in federal court. While the language in MCL 600.605 might be read to cover these cases, this would be an anomalous result. Cases against the state have never—except where expressly authorized—gone to circuit court. Moreover, even if there were a conflict between the COC Act and MCL 600.605, the COC Act contains the more specific provisions on claims against the state and therefore would control over the language in MCL 600.605, giving the circuit court general jurisdiction. See *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 350 (2020). Thus, I do not believe that the COC Act authorizes these claims to go to circuit court.

2. JURISDICTION AND SOVEREIGN IMMUNITY

This conclusion is further confirmed by the doctrinal relationship between jurisdiction and sovereign immunity. Without a waiver of sovereign immunity for claims brought in the circuit court, that court lacks jurisdiction to hear those claims. And waivers are generally court-specific. Neither § 6440 nor anything else in the COC Act effects a broad-based waiver of sovereign immunity necessary for the claims to be brought in any state court other than the COC. This is not simply or even predominantly because waivers of sovereign immunity are supposed to be "strictly" construed. *Greenfield*, 402 Mich at 197. Rather, like any other text, these waivers should be interpreted according to their terms. No one has identified any statutory language that would endow the circuit court with the ability to hear these claims. Critically, nothing in the COC Act suggests that sovereign immunity had been eliminated for these types of claims in *every* court in Michigan or even in any court other than the COC.

As noted above, after citing the jurisdictional provisions in Const 1963, art 6, § 13 and MCL 600.605 in *Greenfield*, 402 Mich at 194, we stated that "it is well settled that the circuit court is without jurisdiction to entertain an action against the State of Michigan unless that jurisdiction shall have been acquired by legislative consent." While *Greenfield* does not explain the link between sovereign immunity and jurisdiction, the cases it relied on do. In *Manion v State Hwy Comm'r*, 303 Mich 1 (1942), we stated:

> The terms of the State's consent to be sued in any court define that court's jurisdiction to entertain the suit. *United States* [*v Sherwood*, 312 US

Corrections, 323 Mich App 479, 490 (2018) (noting our caselaw stating that ELCRA waives governmental immunity). Similarly, under the Whistleblower Protection Act (WPA), 15.361 *et seq*., "employer" is defined to include "the state or a political subdivision of the state," MCL 15.361(b). Actions under the WPA go to circuit court. MCL 15.363(2).

> 584 (1941)]. The "court of claims" is a legislative and not a constitutional court and derives its powers only from the act of the legislature and subject to the limitations therein imposed. [*Manion*, 303 Mich at 20.][7]

In *Sherwood*, the Supreme Court examined the Tucker Act, which authorizes and regulates suits against the federal government. The section at issue involved the authorization for a district court to hear certain cases that would otherwise go to the federal court of claims—in these cases, the district court's jurisdiction was concurrent with that of the federal court of claims. *Sherwood*, 312 US at 590.[8] The suit brought in *Sherwood* was not one that could have been brought in the federal court of claims, and the question was whether the provision allowing suits in the district court with the government's consent somehow gave that court greater jurisdiction than would be wielded by the federal court of claims. Answering in the negative, the Court stated:

> Construing the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity, and in the light of the history of the Court of Claims' jurisdiction to which we have referred, we think that the Tucker Act did no more than authorize the District Court to sit as a court of claims and that the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims. The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. [*Id*. at 590-591 (citations omitted).]

This paragraph demonstrates two points. First, it shows that waivers of sovereign immunity are jurisdictional—without a waiver, the court has no power to hear the case. See also *United States v Mitchell*, 463 US 206, 212 (1983) ("It is axiomatic that the United

---

[7] Another case cited by *Greenfield* connected sovereign immunity and jurisdiction (albeit somewhat less directly) by reasoning that a court loses jurisdiction when the Legislature repeals an act giving consent to be sued. *McDowell v Fuller*, 169 Mich 332, 336-337 (1912).

[8] The Court explained the statutory framework as follows: "Section 2, authorizing suits against the Government in district courts, is an integral part of the statute, other sections of which revised and enlarged the classes of claims against the United States which could be litigated in the Court of Claims. It was the jurisdiction thus defined and established for that court which was extended by the section to the district courts in the specified instances, for in consenting to suits against the Government in the district courts, Congress prescribed that the jurisdiction thus conferred should be 'concurrent' with that of the Court of Claims." *Id.*

States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). Second, it indicates the commonsense notion that the terms of the waiver must be complied with, such that the waiver cannot extend beyond the conditions established by the Legislature.[9]

Despite its relationship to jurisdiction, the concept of sovereign immunity has some independent significance. It is not the case that a grant of jurisdiction necessarily means a waiver of sovereign immunity or vice versa. As such, even when jurisdiction has generally been granted, sovereign immunity must still be waived. As Wright and Miller explain, "A statute waiving the Government's immunity to suit does not always confer jurisdiction upon the federal courts, but sometimes it does. Likewise, a statute conferring jurisdiction upon the federal courts does not always waive the Government's immunity to suit, but sometimes it does." 14 Federal Practice & Procedure (4th ed), Jurisdiction, § 3654 (collecting cases; citations omitted).

In *Blatchford v Native Village of Noatak*, 501 US 775 (1991), the Court explained why this is so. There, the Court examined 28 USC 1362, which provides a general grant of jurisdiction over federal-question claims brought by Indian tribes or bands. The Court held that this statute did not abrogate state sovereign immunity, which can only occur with "unmistakably clear" language from Congress. *Id*. at 786 (quotation marks and citation omitted). The Court's reasoning is equally applicable: "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." *Id*. at 788 n 4.[10] The Supreme Court and

---

[9] It appears that federal courts generally consider the jurisdictional aspect of these waivers to refer to subject-matter jurisdiction. Wright and Miller note that "generally the Court [i.e., the United States Supreme Court] has attached jurisdictional consequences to sovereign immunity and to the Government's waiver of the defense." 14 Federal Practice & Procedure (4th ed), Jurisdiction, § 3654. Continuing, they state: "[C]onsidered as a 'prerequisite for jurisdiction,' the absence of consent by the United States to suit has been treated by courts as a fundamental defect that deprives the district court of subject matter jurisdiction. That principle has been applied in numerous cases . . . ." *Id*. (collecting cases and noting, however, that in some of these cases "jurisdiction has been conflated with a substantive element of the claim or a procedural condition").

[10] See also *Quality Tooling*, 47 F3d at 1575 ("The Government's waiver of sovereign immunity is not only distinct from, it is logically prior to, the Government's grant of jurisdiction. . . . In order for a claim against the United States to be heard, first there must be, because sovereign immunity requires it, consent to be sued; and because, with the exception of the Supreme Court, the subject matter jurisdiction of a federal court is defined by statute, there must be, second, Congressional provision of a court with the authority to hear the claim and grant relief.").

the lower federal courts have applied this general rule to claims against the United States brought in federal court.[11]

Under this same logic, I do not see how MCL 600.605 (or Const 1963, art 6, § 13) could operate as a waiver of sovereign immunity that would allow the state to be sued in circuit court for cases within MCL 600.6440. There is nothing in the COC Act that waives sovereign immunity for claims brought in circuit court. The only argument for finding a waiver would be if the waiver for suits brought in the COC operated as a waiver for suits brought in circuit court.

This argument depends, however, on the proposition that a waiver for one court somehow operates as a waiver in another not mentioned in the statute. The caselaw rejects this argument: waivers are court-specific, unless their terms dictate otherwise. In *United States v Shaw*, 309 US 495 (1940), the United States had obtained a judgment against the administrator of a decedent whose estate was in our probate court. The United States filed its claim on the judgment in a Michigan probate court, against which the administrator tried to set off another claim also filed in that court. After the court allowed the claim of the United States but denied the setoff, we reversed the decision on the setoff. Back before the probate court, the result of the setoff was that the United States owed a little over $23,000 to the estate, for which the administrator obtained a judgment (that we affirmed on appeal). *Id*. at 498.

The question on certiorari before the Court was "whether the United States by filing a claim against an estate in a state court subjects itself, in accordance with local statutory practice, to a binding, though not immediately enforceable, ascertainment and allowance by the state court of a cross-claim against itself." *Id*. at 499. In laying out the general principles, the Court stated:

---

[11] See *United States v Mitchell*, 445 US 535, 538 (1980) ("The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act, 28 U.S.C. § 1491, which gives that court jurisdiction of 'any claim against the United States founded either upon the Constitution, or any Act of Congress.' The Tucker Act is 'only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.' The Act merely 'confers jurisdiction upon [the Court of Claims] whenever the substantive right exists.' The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims.") (citations omitted); see also *Munaco v United States*, 522 F3d 651, 653 n 3 (CA 6, 2008) ("[J]urisdictional statutes, such as the statute giving federal district courts original jurisdiction of civil actions arising under [the] Constitution, laws, or treaties of [the] United States, do not operate as waivers of sovereign immunity.").

> Whether that jurisdiction exists depends upon the effect of the voluntary submission to the Michigan court by the United States of its claim against the estate. As a foundation for the examination of that question we may lay the postulate that without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction. *Even when suits are authorized they must be brought only in designated courts*. The reasons for this immunity are imbedded in our legal philosophy. [*Id*. at 500-501 (citations omitted; emphasis added).]

The relevant statutes provided that when the government voluntarily sued, cross-claims could be filed against it up to the amount of the government's claim. *Id*. at 501. Thus, the Court held that the Michigan courts had no authority to exceed the amount of the government's claim. The reasoning was that the Court had no "right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress." *Id*. at 502.[12]

Shaw relied on another case for the proposition that waivers were court-specific: *Minnesota v United States*, 305 US 382 (1939). In that case, Minnesota sued the United States and others in state court to condemn part of Indian lands for a highway. The parties agreed to remove the case to federal court, where counsel for the United States moved to dismiss because it had never consented to be a party. *Id*. at 384. The relevant statute allowed the Secretary of the Interior to authorize the alienation of land to a state for purposes of building a highway; but there had been no such authorization in that case or any other consent to be sued. The Court held that an authorization to condemn land might imply permission to sue the United States. This did not matter, however, because the authorization (i.e., the waiver) applied only in federal courts, and the case under consideration began in state court: "Congress has provided generally for suits against the United States in the federal courts. And it rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought." *Id*. at 388. The government officer's removal of the case to federal court did not rectify this issue, as officers could not grant jurisdiction. *Id*. at 388-389. Therefore, "[i]f Congress did not grant permission to bring this condemnation proceeding in a state court, the federal

---

[12] The mention of the "designated courts" is important to the case. Claims against the government for an amount greater than the setoff would have to be made in the Court of Federal Claims. See generally *Quality Tooling, Inc*, 47 F3d at 1582-1583 (Schall, J., dissenting) (noting that the Court of Federal Claims had exclusive jurisdiction over claims exceeding a certain dollar amount). Thus, the waiver was keyed to different courts based on the dollar amount at issue. Put differently, the waiver for one court did not function as a waiver for another court.

court was without jurisdiction upon its removal." *Id*. at 389. In other words, the waiver for suits in the federal district court did not extend to suits in state courts.[13]

C. APPLICATION

In light of this analysis, I believe it is clear that circuit courts lack jurisdiction over the present claims. The plain text of neither the COC Act, MCL 600.605, nor Const 1963, art 6, § 13 shows any intent to waive sovereign immunity for cases that meet the requirements of MCL 600.6440 and are filed in circuit court. I therefore cannot see how the circuit court can exercise jurisdiction here. This is true even though Michigan might have waived sovereign immunity at least for the Rehabilitation Act claim. Under the above analysis—and by explicit terms of the federal statute—Michigan's waiver is limited to suits brought in federal court. 42 USC 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States *from suit in Federal court* for a violation of section 504 of the Rehabilitation Act of 1973 . . . by recipients of Federal financial assistance.") (emphasis added).

The ADA claim seeking injunctive relief is a bit trickier. Under *Ex parte Young*, 209 US 123 (1908), "[t]he Eleventh Amendment does not preclude suits against state

---

[13] The lower federal courts have relied on these cases for the proposition that waivers are court-specific. The United States Court of Appeals for the Ninth Circuit cited and discussed them when rejecting the argument that "the Tucker Act generally waives sovereign immunity for suits outside the Court of Federal Claims." *McGuire v United States*, 550 F3d 903, 912 (CA 9, 2008). This was because the Tucker Act gave the Court of Federal Claims jurisdiction over the claims and not other courts. *Id*. at 913 ("There is nothing unusual about our conclusion that the Tucker Act effects a limited waiver of sovereign immunity in the Court of Federal Claims. In other contexts, the Supreme Court has recognized that a waiver of sovereign immunity can be forum-specific: '[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.' ") (citation omitted). As *McGuire* noted, one court had attempted to distinguish *Minnesota* and *Shaw* on the ground that both of those cases involved cross-sovereign courts, i.e., the court without jurisdiction (due to the lack of waiver) was a state court rather than another federal court. *McGuire*, 550 F3d at 914, citing *Quality Tooling*, 47 F3d at 1577 & n 9. Consequently, in *Quality Tooling*, the court decided that the waiver of sovereign immunity in one federal court with jurisdiction operated to waive immunity in another federal court that could exercise jurisdiction. *Quality Tooling*, 47 F3d at 1577. But neither the dissent in *Quality Tooling* nor the Ninth Circuit in *McGuire* was convinced, and I think they have the better argument. Nothing in *Shaw* or *Minnesota* turned on the fact that the other court was a state court. The United States Supreme Court did not suggest it was attempting to protect the sovereignty or authority of federal courts vis-à-vis the state courts.

officers for injunctive relief, even when the remedy will enjoin the implementation of an official state policy," Chemerinsky, Federal Jurisdiction (7th ed), § 7.5.1, p 459. This clearly applies to plaintiffs' claim against the warden for injunctive relief under the ADA.

However, the question is whether this rule requires that the state provide a forum to allow these suits. In *Alden v Maine*, 527 US 706, 747 (1999), the Court observed that *General Oil Co v Crain*, 209 US 211 (1908)—decided the same day as *Ex parte Young*—"extend[ed] the rule of that case [i.e., *Young*] to state-court suits[.]" The Court stated, "Had we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine." *Id*. at 748. In *Crain*, as in *Ex parte Young*, one of the key rationales was that if the officer's action "comes into conflict with the superior authority of that Constitution [i.e., the federal Constitution], . . . he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Young*, 209 US at 159-160; see also *Crain*, 209 US at 226 (noting similar argument).

But neither *Young* nor *Crain* addressed whether states are required to provide a state-court forum for *Ex parte Young* suits.[14] The holding in *Crain*, 209 US at 228, appears narrower: "It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court." This language merely indicates that the issue is reviewable, not that the state court must afford a forum for hearing the claim. Moreover, the Court's phrasing is important. Michigan's sovereign immunity in its own courts has emanated from this state's common law, not the Eleventh Amendment, and thus it is not at all clear that the Court meant to suggest that because the Eleventh Amendment is inapplicable, states also lack sovereign immunity in their courts. See generally *Northern Ins Co of New York v Chatham Co, Ga*, 547 US 189, 193-194 (2006) (" '[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.' ") (citation omitted); *McNair v State Hwy Dep't*, 305 Mich 181, 187 (1943) (" 'The doctrine of sovereign immunity has long been firmly established in the common law of this State . . . .' ") (citation omitted).

---

[14] A few other state supreme courts have held that *Ex parte Young* applies in state courts, but again they did not analyze whether the federal Constitution (as interpreted by Supreme Court caselaw) *mandated* that state courts hear these cases. See *Lee v State*, 844 NW2d 668, 677 (Iowa, 2014) (holding that "*Ex parte Young* applies to state-court suits"); *Gill v Pub Employees Retirement Bd of Pub Employees Retirement Ass'n*, 135 NM 472, 481 (2004) ("*Alden* confirms that *Ex parte Young* also applies in state courts.").

For these reasons, I do not believe that the circuit courts have jurisdiction or are otherwise required to entertain the present claims.[15]

D. THE SUPREMACY CLAUSE

The next question is whether the above interpretation would result in a violation of the Supremacy Clause.[16] While this could be considered a standalone constitutional issue,

---

[15] We ordered supplemental briefing on an issue not raised by the parties: § 6419(1)(a) grants the COC exclusive jurisdiction over claims against the "state," its "departments," and "officers," but the exception in § 6440 applies only to the state and departments, commissions, boards, institutions, and arms or agencies—it does not mention officers. The parties agree that, for various reasons, the exception in § 6440 nonetheless applies to officers. I believe that they are correct. It is well settled in similar areas of the law that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v Mich Dep't of State Police*, 491 US 58, 71 (1989) (citation omitted). Further, " 'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' " *Regents of the Univ of Cal v Doe*, 519 US 425, 429 (1997) (citation omitted). We have, in fact, applied this reasoning when addressing a claim against a state prison warden. In *McDowell v Warden of Mich Reformatory at Ionia*, 169 Mich 332, 336-337 (1912), the plaintiff sued such a person and argued that the action was not against the sovereign state, which was not named as a defendant. We held that because the claim was against the warden in his official capacity and touched upon the warden's action (negotiating and terminating a contract) on behalf of the state, the action was against the state. *Id*. at 336. We stated: "While the contract purports to be the contract of the warden, and he is the nominal party defendant, it was in truth a contract with and for this State, negotiated by and through him as its agent, thus making this action intrinsically against the State of Michigan." *Id*. We have elsewhere said that "courts will look through and beyond the nominal parties to determine the real parties in interest, that where a State officer is sued in relation to official acts it is a suit against the State, and that the State may not be sued without its consent . . . ." *Longstreet v Mecosta Co*, 228 Mich 542, 548 (1924), citing *McDowell*, 169 Mich 332. Under this reasoning, I believe that the suit against defendant warden in his official capacity (for acts taken on behalf of the state in operating the prison) represents a suit against the state that falls within the terms of § 6440.

[16] The Supremacy Clause states:

it also bears upon the interpretation of the COC Act under the constitutional-doubt canon: we seek to avoid rendering interpretations of statutes that raise grave doubts about the statutes' constitutionality. See *In re Certified Questions From the US Dist Court, Western Dist of Mich*, 506 Mich 332, 409 (2020) (VIVIANO, J., concurring in part).

There are no such concerns raised by the interpretation above. As an initial matter, it seems plain that the interpretation does not violate the text of the Supremacy Clause. A state's failure to provide a forum to adjudicate federal causes of action against the state does not render federal law less supreme. The federal law remains binding over any contrary state law. And, as seen above, the federal law at issue here does not purport to require states to create a forum for adjudication of these claims—consequently, my interpretation of federal law does not elevate state statutes above the requirements of federal statutes.

Moreover, the only time the United States Supreme Court has actually opined on the precise question at hand came in *Alden*, where it raised structural arguments in concluding that Congress could not subject nonconsenting states to private suits in their own courts. *Alden*, 527 US at 749. This was because "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself." *Id*., citing *Nevada v Hall*, 440 US 410 (1979), overruled on other grounds by *Franchise Tax Bd of Cal v Hyatt*, 587 US ___; 139 S Ct 1485 (2019). *Alden* further observed the possibility that allowing such suits would violate the anticommandeering doctrine developed under the Tenth Amendment. Under that doctrine, the Supreme Court has held that Congress "cannot compel the States to enact or enforce a federal regulatory program" and "cannot circumvent that prohibition by conscripting the States' officers directly." *Printz v United States*, 521 US 898, 935 (1997). *Alden* stated:

> A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. Such plenary federal control of state governmental processes denigrates the separate sovereignty of the States. [*Alden*, 527 US at 749 (citation omitted).]

Others have expressly argued that, based on the anticommandeering doctrine and other constitutional principles, "Congress cannot commandeer the state legislature by forcing

---

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [US Const, art VI.]

them to vest their state courts with jurisdiction, or forcing state judges to hear cases where they otherwise lack jurisdiction." Blackman, *State Judicial Sovereignty*, 2016 U Ill L Rev 2033, 2038 (2016).[17]

The United States Supreme Court has established a line of caselaw holding that states cannot disfavor federal causes of action, but it has expressly declined to decide whether this caselaw requires states to open their courts to these actions. In contending that the state must open its courts to the federal claims at issue, plaintiffs primarily rely on two such decisions by the United States Supreme Court. In the first, *Howlett v Rose*, 496 US 356 (1990), a Florida statute waiving sovereign immunity was determined to be inapplicable to federal claims brought in state court. A local government invoked that immunity to avoid the federal action in state court and the state courts dismissed the claims with prejudice, meaning that the action could not be subsequently brought in federal courts. *Id*. at 359-361, 365-366. The Court held that this violated the Supremacy Clause, which prohibited "state courts [from] dissociat[ing] themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id*. at 371. The Court acknowledged that states could establish the jurisdiction of their courts and stated that it would "act with utmost caution before deciding that [a state court] is obligated to entertain the claim." *Id*. at 372. But any such rule, even if denominated a "jurisdictional" rule, has to be neutral. *Id*. at 372, 381-382. The statute was not neutral because it singled out federal claims, which were treated differently from similar claims that could be brought in Florida's courts of general jurisdiction. *Id*. at 378.

As a result of this analysis, the Court expressly declined to address the question in the instant matter: "This case does not present the question[] whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights . . . ." *Id*. Thus, the opinion could not be read to apply, by its terms, to the present cases. It would require an *extension* of *Howlett*. Further, the critical portion of the Court's reasoning in *Howlett* came at the end of the opinion:

---

[17] The Supreme Court has observed that, in numerous instances, Congress has imposed obligations on "state judges to enforce federal prescriptions" related to the judicial power. *Printz*, 521 US at 907 (emphasis omitted). But in *Printz*, the Court noted that the source of that power was "perhaps implicit in one of the provisions of the Constitution, and was explicit in another," *id*., neither of which is at issue here. Further, and importantly, the Court explained that "[i]t may well be . . . that these requirements applied only in States that authorized their courts to conduct" the proceedings at issue. *Id*. at 906. As one scholar noted, this seemed to say that "state sovereignty placed a check on the ability of Congress to conscript the state courts into federal service. Congress could pass these statutes, but it wasn't clear that state courts could comply if they lacked the jurisdiction to do so in the first place." *State Judicial Sovereignty*, p 2053. Thus, there is a case to be made that conscripting state courts to enforce federal statutes would violate the Tenth Amendment.

> [A]s to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to [42 USC] 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People. [*Id.* at 383.]

A key problem with Florida's statute—one not present here—is that it led to dismissals *with prejudice*. As Justice Thomas observed, this form of dismissal represented "a decision . . . on the merits," and thus the statutory rule "violated the Supremacy Clause by operating as a state-law defense to a federal law." *Haywood v Drown*, 556 US 729, 763 (2009) (Thomas, J., dissenting) (discussing *Howlett*). This is significantly different than a true jurisdictional rule, which "simply clos[es] the door of the state courthouse to [the] federal claim." *Id*. A state rule that "[r]esolv[es] a federal claim with preclusive effect . . . changes federal law by denying relief on the merits," whereas a true jurisdictional rule "merely dictates the forum in which the federal claim will be heard." *Id*. at 763-764.

In the present cases, my interpretation of the COC Act does not result in denials of federal claims on the merits. A case that is dismissed under MCL 600.6440 would not be dismissed with prejudice and therefore could be subsequently brought in federal court. It would, thus, simply "dictate[] the forum in which the federal claim will be heard." *Id*. at 764. Consequently, reading § 6440 to require actions like the present one to go to federal court does not contradict *Howlett*.

The second pillar of plaintiffs' argument is *Haywood*. But there, once again, the Supreme Court expressly declined to address whether the Supremacy Clause requires states to create judicial fora for the adjudication of certain claims. *Haywood*, 556 US at 739 (opinion of the Court) ("[T]his case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to [42 USC] 1983."). The specific issue in *Haywood* was whether the Supremacy Clause was violated by a state jurisdictional statute providing that 42 USC 1983 actions against correctional officers had to be brought in the court of claims. NY Correction Law 24 (stating that no civil action could be brought against such officers in any court of the state in the officers' personal capacity and that any claim against the officers had to "be brought and maintained in the court of claims as a claim against the state"). By forcing the claim to go to the court of claims, the statute forced the plaintiffs "to pursue a claim for

damages against an entirely different party (the State) in the Court of Claims—a court of limited jurisdiction." *Haywood*, 556 US at 734.[18]

Haywood held that the principal reason the New York statute proved unconstitutional was that it represented a policy preference against this class of lawsuits, and that policy was contrary to federal policy as represented by 42 USC 1983. *Id*. at 736-737. This was true even though the state statute was facially neutral as to federal and state law. As in *Howlett*, the Court relied on the fact that the state had courts of general jurisdiction that could otherwise adjudicate claims under 42 USC 1983. *Id*. at 740. The state could not shut the door to this "particular species of suits" in an attempt "to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners)." *Id*. at 739-740, 741-742.

No such contradiction of federal policy exists in the present cases. The parties have not suggested that MCL 600.6440 represents an impermissible judgment about a class of litigation. By its terms, § 6440 does not even mention federal claims, let alone a particular slice of claims such as those at issue in *Haywood*.[19] Moreover, § 6440 does not shield defendants from liability—it simply requires that the liability be adjudicated in federal court. A further distinction between the present cases and *Haywood* and *Howlett* is that those cases did not involve claims against the state. The statute at issue in those cases, 42 USC 1983, does not apply to states. *Will v Mich Dep't of State Police*, 491 US 58, 66 (1989). Consequently, neither decision can be read as an indication of what the Supreme

---

[18] It appears that, as in *Howlett*, one of the problems with the state statute was that it allowed courts to dispose of cases on the merits: "Although the State has waived its sovereign immunity from liability by allowing itself to be sued in the Court of Claims, a plaintiff seeking damages against the State in that court cannot use § 1983 as a vehicle for redress because a State is not a 'person' under § 1983." *Haywood*, 556 US at 734 n 4. The upshot of the statute, then, was that there was essentially no relief available in state court for this narrow class of § 1983 claims. The Court largely relied on other rationales, however.

[19] For that reason, § 6440 is broad enough to encompass state-law claims against the state that could be adjudicated in federal courts. For example, if the federal court had federal-question jurisdiction over a federal claim, it would also have supplemental jurisdiction over any state-law claim described above. 28 USC 1367(a). Of course, it may seem unusual that the state has waived sovereign immunity for such claims in federal court but not state court. Still, this all goes to show the potential breadth of the statute here, making it quite unlike the statutes dealt with by the Supreme Court.

Court would do with a federal claim that can be brought against the state but for which the state has *never* created a court to hear.[20]

For these reasons, I do not believe that the Supremacy Clause caselaw from the Supreme Court applies here. Perhaps that Court would extend it to the present circumstances, but that would require a new rationale and mode of logic that is not articulated in the caselaw.

III. CONCLUSION

The Court of Appeals decision below opens the doors of the circuit court to certain claims against the state that have never before been heard by that court. By its plain terms, MCL 600.6440 requires these claims to be brought in federal court. This interpretation reflects longstanding caselaw on how jurisdiction relates to sovereign immunity, and it does not run afoul of the Supremacy Clause. I would therefore reverse the Court of Appeals judgment on these grounds. Consequently, I dissent from this Court's decision to deny leave.

ZAHRA and CLEMENT, JJ., join the statement of VIVIANO, J.

[20] To the extent that *Howlett* dealt with immunity, the immunity at issue was statutory and pertained to governmental units below the state level. The Supreme Court "has repeatedly refused to extend sovereign immunity to counties" and other municipalities. *Northern Ins Co*, 547 US at 193.